

IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL F. MARQUES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48267

**FILED**

OCT 22 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying appellant Manuel F. Marques' post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Marques was convicted, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. The district court sentenced Marques to serve two consecutive prison terms of life with the possibility of parole after 20 years. This court affirmed Marques' conviction and sentence on direct appeal.<sup>1</sup>

On July 7, 2006, Marques filed a timely proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. The district court did not conduct an evidentiary hearing, and on November 16, 2006, entered an order denying Marques' petition. This timely appeal followed.

Marques contended that he received ineffective assistance of trial and appellate counsel. To state a claim of ineffective assistance of

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<sup>1</sup>Marques v. State, Docket No. 44316 (Order of Affirmance, November 18, 2005).

trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that counsel's errors were so severe that there was a reasonable probability that the outcome would have been different.<sup>2</sup> "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>3</sup>

First, Marques contended that trial counsel was ineffective for failing to thoroughly investigate his case. Specifically, Marques claimed that counsel should have considered the findings of the State's expert witness, Dr. Thomas Bittker, and his own expert witness, Dr. Dodge A. Slagle, and presented a "psychological defense." With such a defense, Marques argued that he might have been convicted of "a lesser included offense such as voluntary manslaughter" instead of first-degree murder.

We conclude that the district court did not err by rejecting this claim. The district court noted that Marques failed to identify what relevant information would have been discovered with additional investigation or by having the State's expert witness, or his own, testify on behalf of the defense. The district court found that Marques failed to demonstrate that the outcome of the trial would have been different had Dr. Bittker testified. As we concluded in Marques' direct appeal, there was overwhelming evidence of his guilt, including two witnesses who testified that Marques confessed to the murder, and the admission of a

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<sup>2</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>3</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

note written by Marques, stating, "I killed Candy. God forgive me. Came home to sleep will turn myself in tomorrow. Aug. 8th. I'm sorry." In its order denying the petition, the district court noted that defense counsel was present when Dr. Bittker interviewed Marques, and found that it was a strategic decision by counsel not to call either Dr. Bittker or the expert witness noticed by the defense. We agree and conclude that Marques failed to demonstrate that counsel was ineffective in this regard.

Second, Marques contended that appellate counsel was ineffective for failing to "federalize" the sole issue raised in his direct appeal in order to preserve it for federal appellate review.<sup>4</sup> We disagree. The district court found that appellate counsel was not ineffective in this regard. Our review of the record reveals that Marques failed to demonstrate, let alone allege, that the result of his direct appeal would have been different if counsel had "federalized" the issue raised. Therefore, we conclude that the district court did not err by rejecting this claim.

Finally, Marques contended that the district court erred by allowing the State to introduce prior bad acts evidence over the objection of trial counsel. Marques should have raised this issue in his direct appeal. A court must dismiss a habeas petition if it presents claims that could have been presented in an earlier proceeding unless the court finds both good cause for failing to present the claims earlier and actual

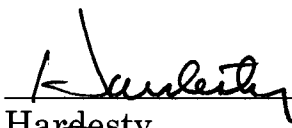
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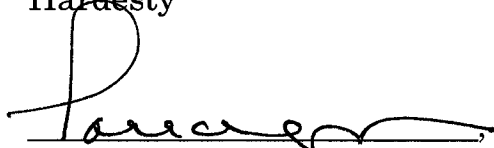
<sup>4</sup>On direct appeal, Marques' sole contention was that the district court erred by failing to give the jury a limiting instruction prior to the admission of evidence that he was subject to a temporary protective order issued on behalf of the victim.

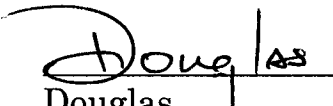
prejudice to the petitioner.<sup>5</sup> This court may excuse the failure to show cause where the prejudice from a failure to consider the claim amounts to a “fundamental miscarriage of justice.”<sup>6</sup> Marques failed to argue that any good cause existed for not raising this claim in his direct appeal, and he failed to demonstrate prejudice amounting to a fundamental miscarriage of justice.<sup>7</sup> We therefore conclude that Marques has waived this claim.

Having reviewed the record on appeal and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.<sup>8</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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<sup>5</sup>See NRS 34.810(1)(b)(2), (3).

<sup>6</sup>Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>7</sup>Cf. Murray v. Carrier, 477 U.S. 478, 496 (1986) (holding that a federal habeas court may grant the writ in the absence of a showing of cause for the procedural default “where a constitutional violation has probably resulted in the conviction of one who is actually innocent”).

<sup>8</sup>See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Hon. Sally L. Loehrer, District Judge  
Manuel F. Marques  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk